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No. 95-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.;
DESTINEER CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THE COURT SHOULD REVIEW THIS CASE NOW.

Despite the court of appeals' remand for the Federal Communications Commission to exercise the challenged authority to charge the winner of a pioneer's preference a multi-million dollar license fee, this case should be reviewed now. First, the issue on which *certiorari* is sought is purely legal — *i.e.*, whether the agency has the power to impose an enormous and unprecedented charge based on its so-called "necessary and proper" authority where such a charge is inconsistent with other provisions of the Act. *See, e.g., Gillespie v. United*

States Steel Corp., 379 U.S. 148, 153-54 (1964) (granting interlocutory appeal where legal issue was "fundamental to the further conduct of the case"); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (same).

Second, the case is clearly "ripe" on a technical level: the issue is fit for review and further delay will only cause hardship to the parties. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). The issue here is purely legal, the agency's position is clear, and delay will not further illuminate the issue or in any way benefit this Court. *See Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1028 (D.C. Cir. 1991). Rather, delay would only harm Mtel and waste administrative resources. Indeed, Mtel could be forced to litigate for years on the assumption that the agency has authority that Mtel firmly believes this Court will find that the agency lacks. Thus, the Court should grant the petition for writ of *certiorari* now.

II. IN REFUSING TO EMPLOY "TRADITIONAL TOOLS OF INTERPRETATION" TO ASCERTAIN CONGRESS'S INTENT ON THE ISSUE HERE, THE OPINION BELOW FAILED TO FAITHFULLY APPLY THIS COURT'S PRECEDENT.

"Statutory construction . . . is a holistic endeavor." *United Savings Ass'n v. Timbers of Inwood Forest Ass'n Ltd.*, 484 U.S. 365, 371 (1988). Thus, in determining whether Congress has "had an intention on the precise question at issue," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court examines the text and structure of the statute as a whole to determine if it is ambiguous. *See, e.g., Brown v. Gardner*, 115 S. Ct. 552, 555 (1994) ("Ambiguity is a creature not of definitional

possibilities but of statutory context . . . ."); *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1401 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole."); *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). The *Chevron* inquiry assesses whether Congress has delegated to the agency the authority to decide the question at issue. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516.

Here, in affirming the Commission's unprecedented assertion of fee-charging authority, the lower court ignored substantive constraints that Congress has placed on the agency's power to collect monies. Pet. 4. In violation of *Chevron*, the lower court ignored the language and structure of the Communications Act and sixty years of agency practice in discovering sweeping FCC fee authority in the agency's "necessary and proper" clause. In reaching this result, the majority gave insufficient weight to two maxims of statutory interpretation that should have been applied in the first instance in assessing the meaning of the statute: that the specific controls the general, *see, e.g.*, *Holder v. Hall*, 114 S. Ct. 2581, 2604 (1994), and the *expressio unius* maxim. *See, e.g.*, *National R.R. Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (*quoting Botany Mills v. United States*, 278 U.S. 282, 289 (1929)). Instead, in interpreting congressional will, the majority below improperly relied on the statute's most general provisions, as well as the FCC's conception of the broad purposes underlying the statute.

A. In Misconstruing the Act, the Lower Court Disregarded Both the *Expressio Unius* Maxim, As Well As the Principle that the Specific Controls the General.

When assessing whether the text is or is not ambiguous, the Court draws on a wide array of "traditional tools;" *Chevron* step 1 is not limited to analysis of the specific terms at issue.[1] Rather, the Court considers the language, structure, and design of the statute as a whole. *See, e.g., NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 124-25 (1987) ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal" Congress's intent; from such sources, the Court found that "the general congressional framework . . . is easy to discern."); *see also, id.* at 128 (referring to "the structure of the Act"). Congress's intent may also be discerned on the basis of other provisions of the statute. *Central Bank v. First Interstate Bank*, 511 U.S. 164, 114 S. Ct. 1439, 1447-48 (1994). If the text, history, and structure of the statute indicate, as is the case here, that the agency lacks the authority it asserts, then the agency's action will be invalidated, even if there is no phrase that directly addresses the exact question at issue.

In undertaking this analysis, the presumption that the delegation of a carefully limited power implies the negation of closely related power is especially important. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *Brown v.*

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[1] *Chevron* asks, first, "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If it has not, and the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Gardner, 115 S. Ct. 552, 556 (1994) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Although some have criticized the presumption, its utility remains clear:

> The purpose of this maxim — and its utility — is to emphasize that statutes should not be casually construed to mandate changes not specified by the language chosen. Second, the maxim is so much a part of the interpretive process that it often need not be cited, or even thought about, because the correctness of the interpretation will not be questioned.

David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 928 (1992). Similarly, the principle that the specific controls the general ensures that particular issues on which Congress has forged and expressed a consensus are not overridden by judicial interpretation of looser language that may embody sentiments, as opposed to hard decisions, about defined questions.[2]

Congress has given the Commission certain powers and denied it closely related powers. As noted in Mtel's Petition,

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[2] Moreover, in the absence of a clear statement of Congress to the contrary, statutory interpretation should protect reasonable, settled expectations. *See, e.g.*, Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 So. Cal. L. Rev. 847, 856 (1991). Here, as even the majority below agreed, Mtel's reasonable "settled expectation" was that it would not have to pay a multi-million dollar license fee. Pet. App. 12a-14a. In addition, the reasonable and settled expectations of those who are not seeking mutually exclusive licenses is that they will not be subject to auction-level fees. 47 U.S.C. § 309(j)(1) (1994) (Pet. App. 86a).

Congress has authorized the FCC to collect monies only in a few, narrowly circumscribed situations. Pet. 4, 20-22. Most relevant here are two: (1) the agency may collect license fees set by Congress that may be increased only in the specific manner prescribed by Congress, 47 U.S.C. §§ 158, 159 (1994) (Pet. App. 75a-85a); and (2) the agency may auction off mutually exclusive licenses 47 U.S.C. §§ 309(j)(1) (Pet. App. 86a). Yet Mtel's charge was not set based on the agency's licensing fee authority, nor did Mtel seek or receive a mutually exclusive license. These two express limitations on the agency's authority to charge monies necessarily limit the more general grant of authority to regulate the electromagnetic spectrum to serve the "public interest, convenience, and necessity," which the agency relied on to impose this charge.

The lower court flatly rejected Mtel's argument as relying too much on the *expressio unius* maxim which, it said, had "little force in the administrative setting." Pet. App. 7a. But, as Chief Judge Edwards' dissent demonstrates, Mtel's criticism of the agency's interpretation cannot be so easily deflected. As in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994)(en banc), *cert. denied*, 115 S. Ct. 1392 (1995), Mtel's conclusion that the agency "lacked authority for its action followed a careful exegesis of the entire statutory context, the statute's legislative history, and the agency's unvarying practice over a 60-year history." Pet. App. 9a. The *expressio unius* maxim, like the principle that specific provisions control the interpretation of more general ones, were part of Mtel's "careful exegesis" revealing the agency's lack of authority to impose an unprecedented multi-million charge.

In asserting that these maxims supply useful presumptions, Mtel is not suggesting that the Commission's power is or should be limited to "those activities and forms of communication that are specifically described by the Act's other provisions." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968). But surely an assessment of whether an agency is empowered to undertake an entirely unprecedented action requires more than a quick survey of the statute to ensure that Congress has not expressly prohibited the proposed action.[3] The Commission's "public interest" authority is indeed broad, but it has not previously been thought to give the FCC, in the words of Chief Judge Edwards, "the power to do whatever it pleases merely by virtue of its existence." Pet. App. 26a. Given that the D.C. Circuit's docket disproportionately involves review of actions by the many agencies having broad grants of authority coupled with so-called "necessary and proper clauses," the Court should review the decision below to clarify that agencies do not have the inherent power to undertake any endeavor unless it has been expressly prohibited by Congress.[4]

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[3] *Cf.* Scalia, *Judicial Deference*, 1989 Duke L.J. at 521 (the more often one finds "that the meaning of a statute is apparent from its text and its relationship with other laws," the less often will one find "that the triggering requirement for *Chevron* deference exists").

[4] Congress's failure to enact H.R. 4700 — which would have required Mtel to pay an auction-based fee — confirms the lack of agency authority to undertake this change. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517, 526-27 (1993). Moreover, when Congress intended pioneer's preference holders to pay, it had little trouble doing so expressly through the GATT legislation (47 U.S.C. §309(j)(13)(B)). *See Central Bank*, 114 S. Ct. at 1448 (declining to extend the statute to include "aiding and abetting liability" in part because "Congress knew how to impose aiding and

B. Congress's Specific Statutory Directions Cannot Be Overridden By Reference to Some Broad Purpose.

The majority opinion defended its interpretation of the Commission's authority as true to the broad purposes of the auction provisions, one of which was to raise revenue. But, as this Court explained in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986):

> Application of the "broad purposes" of the legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Yet that is exactly the mistake that the majority opinion makes. Seeking to effectuate "the benefits of Congress's own new policy — including obtaining reimbursement for the transfer of a valuable entitlement," Pet. App. 9a, the lower court subjected Mtel to an auction-level fee. It did so despite its concession, which is reiterated by the FCC in its Opposition, that "the statute did not . . . authorize the Commission to apply its bidding procedures to applicants who had won pioneer's preferences." Opp. 4; *see also* Pet. App. 8a.

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abetting liability when it chose to do so").

And, it must be recalled, that Congress, in the very same statute, ackowledged the pioneer's preference program by expressly permitting the FCC to continue awarding such preferences. 47 U.S.C. § 309(j)(6)(G) (1994) (Pet. App. 90a). The court of appeals therefore erred in finding that Congress had implicitly empowered the FCC to charge the same types of fees to pioneers that it explicitly authorized the agency to charge those who had been awarded mutually exclusive licenses (which, it will be recalled, pioneer's preference are not (47 C.F.R. § 1.402(c) (1994) (Pet. App. 101a)).

In the absence of a clear statement by Congress to the contrary, fundamental policy decisions are to be made by Congress, not by an administrative agency. *See, e.g., United States v. Taylor*, 487 U.S. 326 (1988) (Scalia, J., concurring). Whether an agency may charge licensees multi-million dollar fees is plainly a fundamental policy decision. Congress has paid careful attention to the issue of license fees through the years, and has narrowly confined the agency's authority to administer such charges. Yet the Commission has decided that because it has determined that such a fee is in the public interest, and it has the authority to do that which is "necessary and proper," it can arrogate to itself the authority to make this decision. *See* Pet. App. 26a (Edwards, C.J., dissenting in part). This was clear error. The Court should grant the petition for writ of *certiorari*, and reverse the decision below.[5]

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[5] The FCC contends that Mtel has not challenged in the Supreme Court the Commission's reasoning that giving one narrowband PCS provider a free license "could seriously distort both the market and the auction itself." Opp. 4-5. Mtel strongly contested the validity of this contention before the D.C. Circuit. *See, e.g.*, Brief of Appellant Mtel, No. 94-1552 at 24-26, 31-33 (D.C. Cir.) (filed Nov. 8, 1995). Because the D.C. Circuit agreed with Mtel that the agency's decision was arbitrary

CONCLUSION

For the reasons set forth herein and in Mtel's petition for writ of *certiorari*, the Court should vacate the opinion below and set the case for plenary review.

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and capricious, Mtel need not press that point with this Court. Rather, this challenge focuses exclusively on the scope of the FCC's authority granted by Congress.